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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

JANICE FITZGERALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN R. WYLDE
JACK S. NORDBY
430 Oak Grove St., #205
Minneapolis, MN 55403
(612) 874-6426

ALAN CAPLAN
2340 Vallejo
San Francisco, CA 94123

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

Are search warrants purporting to allow seizure of "indicia" of memberships in lawful associations ever consistent with First Amendment rights of assembly?

Can the judicially created "inevitable discovery" exception to the exclusionary rule, about which the circuits are in conflict, be used to prevent suppression of items seized under the purported authority of an "indicia" warrant found to be unacceptable according to Fourth Amendment principles?

In this case a panel of the appellate court, approved, in a case of first impression, "indicia" warrants but found the particular warrants to be insufficient to meet Fourth Amendment criteria. The court refused to order suppression of the illegally seized items, holding that their discovery was inevitable during the course of a second state warranted search.

Neither the validity of "indicia" warrants nor the rule of "inevitable discovery" have been examined by this Court. The former is an issue but recently presented to two federal appellate courts whose reasoning appears to conflict. The later issue has been resolved in opposite ways by the several federal appellate courts.

Can portions of an invalid search warrant be "severed" from other invalid portions, and items found in plain view during a search under the valid portions then be held admissible?

In the present case the court en banc held in the affirmative.

REPORTS OF OPINIONS BELOW

The opinion below is not yet reported. The previous opinion of the court of Appeals is reported at 705 F2d 293 (8th Cir. 1983), cert. den. __ US __ (No. 83-600, January 23, 1984).

JURISDICTION

Date of Judgment Sought to be Reviewed: December 7, 1983.

Statutory Provision Believed to Confer Jurisdiction: 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers and

effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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STATEMENT OF THE CASE

The facts relative to the resolutions of the issues raised by this petition are succinctly presented by the appellate court in its opinion.[1]

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[1] Infra pp. A-1 et seq.

Petitioner and seven others[2/] were charged in a three count indictment by a grand jury in the District of Nebraska on February 27, 1981. Count I charged all with a conspiracy to distribute methamphetamine, nine years in duration, conducted through the Hells Angels Motorcycle Club. All defendants were past or present members of the club except Petitioner, who was the widow of a member.

After the indictment was returned, arrest warrants were obtained for each of the defendants named therein, and search warrants for the purported residence of the defendants authorizing a search for "indicia" of membership in, and/or association with, the Hells Angels Motorcycle Club.

At approximately 4:00 a.m. on Febru-

[2/] Of those ten, six, including Petitioner were jointly tried. Judgments of Acquittal discharged one, a second did not appeal. Convictions of three were affirmed, United States v. Apker et al, 705 F.2d 293 (8th Cir. 1983), cert. den. ___ U.S. ___ (No. 83-600, January 23, 1984).

ary 28, teams of law enforcement officers from the United States Attorneys Office, U.S. Bureau of Alcohol, Tobacco, and Firearms (AFT), U.S. Drug Enforcement Agency (DEA), Nebraska State Patrol (NSP), Douglas County Sheriff's Office (DCSO), and Omaha Police Division (OPD) met at OPD headquarters. There they were addressed by various Federal and local officers with respect to plans and procedures for executing the arrest and indicia search warrants, including the Acting United States Attorney and the head of the OPD Special Intelligence Unit.

They were told that in executing the indicia search warrant they should be looking for property that would document affiliation with the Hells Angels, given to understand that they could open every drawer in any residence, and that even a sealed envelope could be opened, and that each officer should individually decide whether or not a particular item should be

seized. They were further given to understand that their discretion in this regard was unlimited.

Despite the fact that the indicia search warrant did not mention firearms or controlled substances, those present at the briefing were told to be on the lookout for guns and drugs. They were also told that, in the event that suspected controlled substances were observed during the execution of the federal indicia search warrant, machinery had been established to obtain a State of Nebraska search warrant quickly. A judge or magistrate was standing by, and typists and other state and federal law enforcement leadership personnel, including Lt. Fleharty and acting U.S. Attorney, Thalken, were available to assist in this process.

During the execution of the federal warrants drugs and guns were discovered at the various residences where petitioners were arrested and seized. State search

warrants for the seizure of drugs were issued by the personnel who were standing by. A superceding indictment containing fifteen counts was returned on April 23. This indictment added counts of possession of controlled substances (seized on February 28) with intent to distribute as well as unlawful possession of firearms by felons.

Motions for Judgment of Acquittal at the close of the government's case on the conspiracy counts were granted in favor or all defendants. The jury returned guilty verdicts of the lesser offense of possession of controlled substances on those counts which charged possession with intent to distribute, and of unlawful possession of firearms. Only the latter convictions were appealed.

The "indicia" warrants purported to authorize the seizure of specific articles of clothing distinctive to the club, plaques and mirrors inscribed with the club

name, "other items which give the names of members of the Hells Angels," photographs of club members, lists of members locally and nationally, the club records and papers to determine membership.

Before the appellate court petitioner contended that the federal "indicia" warrants were invalid as an infringement upon First Amendment rights to Freedom of Association. The appellate court was faced with a case of first impression. Indeed, the issue has been presented to only one other federal appellant court, the Court of Appeals for the Ninth Circuit, in a case which was being considered simultaneously. These courts did not agree on the appropriate disposition of the issue, positions which will be considered in more detail in the Argument. The Eighth Circuit rejected the First Amendment claims, and decided the case almost exclusively on a Fourth Amendment analysis. U.S. v. Apker, 705 F.2d 293 (8th Cir. 1983). The court

found that there was a sufficient nexus between the items sought in the "indicia" warrants and the alleged criminal behavior to support their issuance. The court did, nevertheless, hold the warrants to be invalid by applying the doctine of "scrupulous exactitude" to the particularity requirement of the Fourth Amendment because of the First Amendment protection applicable to membership in the Hells Angels Motorcycle Club. Although the court was satisfied that the items of clothing were described with sufficient particularity the "other items" authorized to be seized to determine club membership were not.

Appellants also argued that the warrants violated the Fourth Amendment in that they were but a pretext for gaining entry to the residences to conduct general searches for guns and drugs, and that they were overly broad and not issued upon probable cause. The appellate court observed that the pretextual argument was

not frivolous but did not vitiate the warrant on those grounds as applying a "clearly erroneous" standard.

Despite holding the "indicia" warrants invalid, however, the appellate court concluded that suppression was not required by applying, for the first time in the Eighth Circuit, an "inevitable discovery" exception to the exclusionary rule, as to all Appellants except the present Petitioner. The court concluded that some police activity could surround the execution of the valid federal arrest warrants and that the later state search warrants issued for the seizure of drugs would have resulted in the inevitable discovery, not only of drugs but the firearms.

The Judgment of appellate court was entered on April 19, 1983, and a petition for rehearing was denied on August 8, 1983, as to three appellants. Petitioner Fitzgerald's conviction was reversed, however, the court holding the inevitable

discovery rule did not apply to the firearms seized from her. Rehearing was granted as to her, upon the government's application, and the Eighth Circuit en banc reversed the panel decision and reinstated her conviction, holding that the firearms were validly seized under the "plain view" doctrine, and that the portions of the warrant held invalid by the panel could be "severed" from the invalid portions. Three guns were seized from Petitioner: a shotgun in a closet, a pistol in a coat, and a rifle "behind a dresser drawer." The Court appears to confuse its ruling to the validity of the seizure of the shotgun. In other respects it left the earlier panel decision intact. Judges Heaney and McMillian dissented; Judges Arnold, Ross, John R. Gibson, Fagg and Bowman concurred in the affirmative, but would have held all three guns admissible; Judge Floyd R. Gibson would have affirmed the conviction on the inevitable discovery rationale.

REASONS THE WRIT SHOULD BE GRANTED

THIS CASE PRESENTS SPECIAL AND IMPORTANT REASONS WHY THIS COURT SHOULD REVIEW THE OPINION OF THE COURT BELOW: THE CONSTITUTIONAL IMPLICATIONS OF INDICIA SEARCH WARRANTS, AN ISSUE WHICH HAS BEEN PRESENTED TO BUT ONE OTHER FEDERAL COURT OF APPEALS AND HAS NOT BEEN RULED UPON BY THIS COURT; AND THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE CONCERNING WHICH THERE IS A CONFLICT AMONG FEDERAL COURTS OF APPEAL, THE "SEVERANCE" RATIONALE DEFEATS THE FOURTH AMENDMENT'S PROTECTION

The Eighth Circuit did not reach the First Amendment claims of petitioners justifying invalidation of the "indicia" warrants, deciding that its "sufficient nexus" conclusion was dispositive. In its initial panel opinion the Court did, however, recognize the possible First Amendment implications of the "indicia" warrants, citing Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) and NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). The

court concluded, nevertheless, that proof of membership in the club would help show appellants' association with each other and their opportunity to use the Hells Angels organization for illegal activities.[3]

The Ninth Circuit was presented with an identical issue in United States v. Rubio, 703 F.2d 1124 (9th Cir. 1983). The Rubio court placed greater First Amendment significance on membership in a group or association not per se illegal, even faced with a allegation of illegal activity by some individual members of the association. Establishing an association does not establish support for a warrant for seizure of indicia of that association. Nor would the "mere evidence" rule of Warden v. Hayden[4] support the warrant

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[3] 705 F.2d 293, 298 (8th Cir. 1983) (emphasis supplied).

[4] 387 U.S. 294 (1967).

according to Rubio court. [W]here there is no allegation that the enterprise is wholly illegitimate . . . evidence of mere association would not necessarily aid in obtaining a conviction."[5/]

This court must mandate a more scrupulous adherence to the right of freedom of association. To justify a First Amendment infringement by reliance upon the word "particularly" in the Fourth Amendment is far too tenuous a "safeguard" of the people to peacefully assemble. Why is the seizure of a particular article of clothing approved when the seizure of other items protected by the First Amendment is decried? Is it permissible to seize a membership roster merely because a police officer can generally describe its container?

There has never been a suggestion in this case that the warrants were issued

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[5/] Id. at p. 1129.

for any purpose other than to seize evidence of membership in the Hells Angels Motorcycle Club (unless it is the pretextual possibilities of the search spoken of by the appellate court), and here lies the rub of any "indicia" search warrants. The government can allege that any organization is engaged in criminal activity, preferably conspiratorial in nature, and launch an exploratory search for particularly described evidence of association, as opposed to particularly described evidence of wrongdoing, which may yield evidence of possible criminal activity.

The analysis by the Eighth Circuit is simply not satisfactory. The Fourth Amendment intrusion into areas protected by the First Amendment deserves at least as careful an exposition as that provided by the Ninth Circuit and more. To repeat, protection is not provided by requiring merely a particularized description of the indicia of association, rather it is

the particularized description of a subject's criminal activity which must be required. The principal of Zurcher v. Stanford Daily[6/] should apply at the threshold of the residence and not merely after entry has been attained.

After holding the "indicia" warrant invalid, the appellate court adopted an "inevitable discovery" rule and applied it to avoid suppression of the guns which are predicate for the instant convictions.

The Sixth Circuit has rejected this rule in United States v. Griffin, 502 F.2d 959, 961 (6th Cir.), cert. denied, 419 U.S. 1050 (1974). That court held that such speculation is beyond judicial review and would "tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." Although, as the Eighth Circuit pointed out, the majority of federal appellate courts have embraced

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6/ 436 U.S. 547 (1978).

this "exception" to the exclusionary rule, it is submitted that this Court should take this opportunity to prune such a speculative concept from the Fourth Amendment. In any event, the circumstances of this case do not admit of any such doctrine, and the appellate court was incorrect in applying it here.

The appellate court held that although the warrants were invalid, the firearms would have been discovered under the later state warrants for drugs, based on so-called "plain view" observations. The appellate court accepted the government's position that even if the guns were seized under the invalid federal warrants before the state warrants were obtained the "inevitable discovery" rule operates to frustrate suppression. This reasoning overlooks several important facts.

In the first place, the "indicia" searches were unlawful ab initio, and even if the entries were lawful they would only

have justified arrests and not searches; the contraband was discovered during the "indicia search", beyond the scope of apprehending the suspects and securing the premises.

Secondly, the officers had been specifically briefed and instructed to look for firearms and drugs, thus, the finding of these items could not possibly be "inadvertent" or justified under any plain view doctrine.

Thirdly, no warrants were ever obtained for seizure of firearms; the later state-issued warrants were only for drugs, and no logical or Constitutional distinction can justify seizure of the firearms without benefit of warrants.

The appellate court, in United States v. Apker, et al, supra, incongruously, despite its application of the "inevitable discovery" rule, rejected the government's proferred "plain view-severance" rationale (adopted by Judge Bright, dissenting in

part) holding that "indicia warrants by their very nature are potentially subject to abuse." Yet it was only by an even more dangerous and attenuated application of a "plain view" species of rationale-the "inevitable discovery" theory-that the court affirmed these convictions.

It is, therefore, contended that the reasoning of the Sixth Circuit in Griffin is correct, and that any concept of inevitable discovery can involve merely judicial speculation beyond the realm of valid appellate activity. Such a rule should be rejected by this Court, and this case provides an excellent opportunity for doing so. The existence of the state warrants should not undermine this position as the appellate court indicated that its application of the inevitable discovery rule is operative regardless of the timing of the discovery of the firearms.

In the opinion now under review, the majority of the en banc court, while

it recognized "the dangers which would attend on this approach were it carelessly administered," held that "absent a showing of pretext or bad faith" a search may be conducted pursuant to a partially valid warrant, and any items found during a search legitmately under the valid portions would be admissible provided (a) the item was in a place reasonably covered by a valid part of the warrant, (b) the items was found before discovery of all the objects sufficiently described in the warrant, and (c) the other requirements of the "plain view" doctrine were satisfied. See cases cited in notes (3) and (4) of the opinion. The en banc court, unlike the panel in the earlier decision, found no evidence of "pretext". The highly sensitive First and Fourth Amendment aspects of the "indicia" warrants themselves, distinguish this case from the "inevitable discovery" cases

relied upon by the appellate court. The court did observe that pretexts can at time go unnoticed by a magistrate and the possiblity of an almost unlimited search may prove very tempting for law enforcement officials.

After first recognizing that the claims of pretext by petitioners were "not frivolous" the appellate court, nevertheless, refused to invalidate the search on those grounds, overlooking several facts: (1) the officers conducting these highly organized simultaneious searches (based only on the conspiracy charges and "indicia" warrants) were told to expect to find firearms and drugs; (2) machinery was in place to obtain drug warrants, but no effort or plans were even made to obtain firearm warrants; (3) the federal magistrate who issued the indicia warrants was not informed of these expectations and intentions; (4) the officers were given and in fact exercised unlimited discretion in their

broad and probing searches under the pretext of the "indicia" warrant; (5) certain items were seized which were utterly beyond any of the warrants or even the "inevitable discovery" rationale. Nothing supports a finding that the searches and seizures were anything but pretextual; on the contrary all of the facts confirm it.

Thus the Eighth Circuit's two opinions themselves appear to be in conflict with one another both on the "pretext" issue and the "severability" issue.

In the present, Fitzgerald opinion, dissenting judges Heaney and McMillian in fact would have reversed the conviction, "without hesitation,"finding the search of petitioner "in reality nothing more than a fishing expedition." In deed the dissentions went further and found no nexus or probable cause to search petitioner Fitzgerald since indicia of club membership would only prove she was the widow of a member, and not that she was part of any

conspiracy; and the dissent added that the previous indictment did not supply probable cause.

The "severance" approach adapted by the Eighth Circuit majority is not only inconsistent with the Fourth Amendment, but virtually invites the abuses the majority itself foresaw, that the "police might be tempted to frame warrants in general terms, adding a few specific clauses in hope that under protection of those clauses they could engage in general rummaging through the premises and then contend that any incriminating evidence they recovered was found in plain view." That, we submit, is precisely what took place here, and is likely to become routine practice if this opinion is allowed to stand.

CONCLUSION

This case is a uniquely appropriate one to bring before this Court at this early opportunity the question of the validity of "indicia" search warrants, and

to address the concept of an "inevitable discovery" exception to the exclusionary rule, concerning which there is a conflict among the circuits.

Finally, this case provides a timely opportunity for the Court to review the doctrine of "severance" of search warrants, under which items seized pursuant to otherwise invalid warrants, perhaps pretextual in nature, nevertheless evade the Fourth Amendment's proscription on illegal searches.

Respectfully submitted,

JOHN R. WYLDE
JACK S. NORDBY
430 Oak Grove St.
Suite 205
Minneapolis, MN 55403

ALAN CAPLAN
2340 Vallejo
San Francisco, CA 94123

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1242

United States of America, *
Appellee, * Appeal from the United States District
v. * Court for the District of
Janice Fitzgerald, * Nebraska.
Appellant. *

Submitted: September 2, 1983

Filed: December 7, 1983

Before LAY, Chief Judge; FLOYD R. GIBSON, Senior Circuit Judge; HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges. EN BANC.

BRIGHT, Circuit Judge.

A jury convicted Janice Fitzgerald and three codefendants of violating 18 U.S.C. App. § 1202(a)(1)(possession by a convicted felon of a firearm in interstate

commerce).[1] A three-judge panel of this court affirmed the convictions of the three codefendants, but on a divided vote reversed Fitzgerald's. United States v. Apker, 705 F.2d 293 (8th Cir. 1983).

The United States petitioned for rehearing en banc, which this court granted, limited to the question whether firearms discovered in plain view during the course of a search pursuant to a federal search warrant, which warrant fails to describe some of the objects of the search with sufficient particularity, are admissible into evidence. We hold such firearms admissible, and affirm Fitzgerald's conviction. Except as to this issue, our decision en banc does not otherwise disturb the panel opinion in this case.

I. Background.

A grand jury indicted Fitzgerald and

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[1]The Honorable Albert G. Schatz, United States District Judge of the District of Nebraska, presided at trial.

nine other persons, alleging that as members or associates of the Hells Angels they conspired to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Federal warrants issued authorizing the arrest of the indictees, and the search of their residences for various indicia of Hells Angels membership which would serve to establish their involvement in the alleged drug conspiracy.[2]

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[2]The search warrants authorized the search and seizure of the following items:

A. Sleeveless leather and jean jackets with a Death's Head insignia with wings on the back with the notation "Hell's Angels" written above the Death's Head and the state that the party is a member of, in this case Nebraska, is written beneath the Death's Head symbol (commonly and hereafter referred to as "Hell's Angel's Colors").

B. A metal belt buckle which states "Hell's Angels" on it.

C. Certain plaques, mirrors and other items which give the names of members of the Hell's Angels.

(continued)

Teams of federal and state law enforcement officers executed the arrest and search warrants early on the morning of February 28, 1981. At Fitzgerald's residence, the officers seized a Hells Angels T-shirt, a Hells Angels poster and medallions, a mirror bearing a Hells Angels sticker, a large number of photographs and photo albums, a telephone directory, and various other documents. They also seized three firearms: (1) a shotgun found in its case resting against the wall of a bedroom closet, (2) a pistol found in the

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D. Photographs which depict the association of members of the Hell's Angels.

E. Telephone books with telephone numbers listed therein of members of the Hell's Angels, which includes local and national members.

F. Certain papers relating to Club activities, expenditures, financial records, Club rules and regulations.

G. Red T-shirts with "Hell's Angels" printed on them.

pocket of a woman's coat hanging in the closet, and (3) a rifle found "behind a dresser drawer." These firearms supplied the basis for Fitzgerald's subsequent indictment and conviction under § 1202(a)(1), from which conviction she now appeals.

The three-judge panel which initially considered the appeal of Fitzgerald and her codefendants held the search warrants invalid on the ground that they failed to describe some of the objects of the search with sufficient particularity. Specifically, the panel determined that the warrant provisions authorizing the seizure of Hells Angels membership directories and "papers relating to the Club activities" were too broad to satisfy the "scrupulous exactitude" standard which applies to warrants impinging on first amendment interests. See United States v. Apker, supra, 705 F.2d 293, 299-303. The invalidity of those portions of the warrants is not at

issue here. But the panel also held that the portions of the warrants describing jackets, belt buckles, T-shirts, photographs, and plaques and mirrors satisfied the scrupulous exactitude requirement. Id. at 302-303. The precise issue before the court on this rehearing is whether the invalidity of certain portions of the warrants renders the warrants wholly invalid, as the panel majority held, or whether, rather, the insufficiently particular portions of the warrant can be severed from the rest, leaving the warrant intact apart from the severed portions.

For the reasons set forth below, we adopt the severance approach, and hold the warrants valid as to those portions which authorized a search for particular items, i.e., certain articles of clothing, belt buckles, plaques and mirrors, and photographs tending to show association with the Hells Angels. Because the warrants as redacted were valid, the police possessed

authority under the "plain view" doctrine, see Texas v. Brown, 103 S.Ct. 1535 (1983), and Coolidge v. New Hampshire, 403 U.S. 443, 464-73 (1971), to seize any apparent contraband or evidence of a crime they might inadvertently find while executing the valid portions of the warrant. On the record before us, it appears clear that the officers discovered the shotgun in Fitzgerald's closet in plain view during the search for clothing carrying insignia of the Hells Angels. Because the shotgun seized during the execution of the valid portions of the warrant suffices to support Fitzgerald's conviction under § 1202(a)(1), we affirm that conviction.

II. Discussion.

The prime purpose of the rule excluding evidence seized in violation of the fourth amendment is the deterrence of future unlawful police conduct. United States v. Calandra, 414 U.S. 338, 347 (1974). Additionally, the rule serves to protect

courts from any taint-by-association with police misconduct, and prevents the prosecution from benefiting from unconstitutional police activity. See United States v. Cook, 657 F.2d 730, 734 (5th Cir. 1981). In deciding whether particular evidence should be suppressed in any given case, then, courts properly weigh the deterrent effect of the suppression against its societal costs. See, e.g., United States v. Janis, 428 U.S. 433, 453-54, 457-58 (1976). Where little or no deterrence will result from suppression, suppression is inappropriate, for where the reason for the rule ceases, its application also must cease.

Here, then, we consider whether suppressing the firearms seized in Fitzgerald's bedroom would advance the purposes which animate the exclusionary rule. First, we observe that the law enforcement officials in this case sought and obtained arrest and search warrants from a magistrate. The magistrate, the district court, and the

three-judge panel of this court all concluded that the police had probable cause to search Fitzgerald's residence. Five of the seven clauses of the search warrant met the particularity requirement in describing the objects of the search; the other two were subsequently held deficient only in that they failed to satisfy the "scrupulous exactitude" test. Nothing in the record suggests that the officers or the magistrate did not believe themselves to be according the indictees' constitutional rights the full respect they merit. Under these circumstances, we do not think it would advance the purposes behind the exclusionary rule to exclude all that the officers seized in Fitzgerald's residence, merely because the warrant was in one respect deficient. Accordingly, we follow the approach which the First, Third, Fifth,

Sixth, and Ninth Circuits,[3] and several states,[4] have adopted, and hold that, absent a showing of pretext or bad faith on the part of the police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution. More precisely, we hold that the infirmity of part of a warrant requires the suppression

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[3] See United States v. Riggs, 690 F.2d 298 (1st Cir. 1982) (adopting severance); United States v. Christine, 687 F.2d 749 (3d Cir. 1982)(adopting severance); United States v. Cook, supra, 657 F.2d 730, 734-36 (5th Cir. 1981)(adopting severance); United States v. Freeman, 685 F.2d 942, 952-53 (5th Cir. 1982)(admitting evidence discovered in plain view during execution of the valid portions of a severed warrant); Sovereign News Co. v. United States, 690 F.2d 569, 576 (6th Cir. 1982)(adopting severance), petition for cert. filed, 51 U.S.L.W. 3775 (U.S. April 11, 1983)(No. 82-1676); United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982)(endorsing the severance approach but holding the warrant in question not susceptible of severance).

[4] See, e.g., Aday v. Superior Court, 55 Cal. 2d 789 (1961)(admitting items seized pursuant to valid portions of warrant, other portions of which were insufficiently particular). See also United States v. Giresi, 488 F.Supp. 445, 459 n.17 (D.N.J. 1980) (collecting state cases).

of evidence seized pursuant to that part of the warrant (assuming such evidence could not otherwise have been seized, as for example on plain-view grounds during the execution of the valid portions of the warrant), but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized --on plain view grounds, for example--during their execution). This approach, we think, complies with the requirements of the fourth amendment.

We recognize the dangers which would attend on this approach were it carelessly administered. The police might be tempted to frame warrants in general terms, adding a few specific clauses in the hope that under the protection of those clauses they could engage in general rummaging through the premises and then contend that any incriminating evidence they recovered was found in plain view during the search for the particularly-described items. We

believe, however, that careful administration of the rule will afford full protection to individual rights. First, magistrates must exercise vigilance to detect pretext and bad faith on the part of law enforcement officials. Second, courts should rigorously apply the exclusionary rule to evidence seized pursuant to the invalid portions of the warrant. Third, items not described in the sufficiency particular portions of the warrant will not be admissible unless it appears that (a) the police found the item in a place where one would reasonably have expected them to look in the process of searching for the objects described in the sufficiently particular portions of the warrant, (b) the police found the item before they found all the objects described in the sufficiently particular portions of the warrant (that is, before their lawful authority to search expired), and (c) the other requirements of the plain view rule--inadvertent dis-

covery and probable cause to associate the item with criminal activity--are met.

III. Conclusion.

Applying these standards to Fitzgerald's case, we conclude that at least one of the weapons introduced against her was properly received into evidence. The valid portions of the warrant authorized the officers to search for, among other things, certain jackets, T-shirts, and belt buckles. The officers would reasonably have looked in the bedroom closet for these items, and it was there, in plain view, that they found the shotgun. The officers never found a Hells Angels belt buckle or jacket at Fitzgerald's residence, so their discovery of the shotgun occurred before the expiration of their authority under the warrant to search for particularly-described items. Because the record reflects neither pretext, bad faith, nor lack of inadvertence on the officers' part, the district court properly

admitted the shotgun into evidence.

The pistol, on the other hand, is not admissible. We do not think the police had reason to search the pockets of an ordinary overcoat while looking, pursuant to the valid portions of the warrant, for Hells Angels insignia. Likewise, the record relating to the discovery of the rifle fails to disclose sufficient information to permit us to conclude that the officers discovered it in plain view during the execution of the valid portions of the warrant. We know that the police discovered the rifle "behind a dresser drawer," but not why they were looking there. But because possession of one weapon is enough to support a conviction under § 1202(a)(1), it is not necessary to determine whether the rifle is admissible. In the context of this case, moreover, the trial court's admission of the pistol and rifle into evidence must be deemed harmless error.

The conviction is affirmed.[5]

FLOYD R. GIBSON, Senior Circuit Judge, concurring in the result.

While I concur in the result upholding Fitzgerald's conviction based upon the admission of the guns seized from her residence, I would reach that result by applying the widely adopted inevitable discovery exception to the exclusionary rule. Although the record shows the guns were actually seized pursuant to the partially invalid federal search warrant, they were nevertheless admissible against Fitzgerald because they could have been discovered while the officers were executing the valid state search warrant authorizing the search of Fitzgerald's residence for suspected controlled substances.

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[5]Chief Judge Lay joins this opinion in its entirety. Judges Ross, Arnold, John R. Gibson, Fagg, and Bowman join in all but Part III. of this opinion, and concur in the affirmance. Judge Floyd R. Gibson concurs in the result only, for the reasons set forth in his separate opinion.

In the original panel opinion, I applied the inevitable discovery exception to uphold the convictions of Apker, Davenport, and Gearhart, finding that the guns admitted against them could have been discovered pursuant to independently obtained valid state search warrants authorizing the search of their residences for "suspected controlled substances." In Fitzgerald's case, however, I refrained from applying the inevitable discovery exception to permit the admission of the guns discovered at her residence, finding no evidence of an independent state search warrant for her residence. See United States v. Apker, 705 F.2d at 306-07.

Upon reviewing the record again, I realized that there was a valid state search warrant authorizing the search for drugs at Fitzgerald's residence (Government exhibit #7). The state search warrant was based upon Omaha Narcotics Officer Tomschecks' observation of suspected con-

trolled substances shortly after he and three other officers arrived at Fitzgerald's residence to execute the federal arrest and search warrants. In his affidavit in support of the state search warrant, Officer Tomscheck stated that while he was serving the "Federal Search Warrant", he observed "one metal vial containing suspected cocaine residue and one cocaine metal tooter" on the top of a bedstand in Fitzgerald's bedroom. At the suppression hearing, Tomscheck testified that he first observed the vial and tooter on the bedstand while he was conducting a "sweep search" (i.e., a search for persons who might present a security risk) incident to the execution of the federal arrest warrant. (See suppression hearing transcript 65-68).

The validity of the state search warrant, and hence the propriety of admitting the guns under the inevitable discovery exception, depends upon whether Tomscheck saw the suspected cocaine residue while

conducting the legitimate sweep search incident to the arrest or while executing the partially invalid federal indicia search warrant.* If Officer Tomscheck had seen the suspected cocaine residue during the sweep search, then the state search warrant would have been valid and the guns would have been admissible under the inevitable discovery exception. See Apker, 705 F.2d at 306-07. However, if he had seen these items while executing the invalid

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*Under the majority's plain view-severance approach, this inquiry would be of academic interest only. First, the plain view-severance approach justifies the eventual seizure of the guns regardless of the validity of the state search warrant. Second, even considering the validity of state search warrant, the officer's plain view observations would provide a valid basis for the issuance of the state search warrant for drugs regardless of whether those observations were made during the execution of the valid federal arrest warrant or during the execution of the partially invalid federal search warrant. Since Officer Tomscheck clearly observed the suspected cocaine residue "in a place where one would reasonably have expected [him] to look in the process of searching for the objects described in the sufficiently particular portions of the [indicia] warrant", (maj. opin. at 7) the state search warrant would not be the fruit of any poisonous tree.

federal indicia search warrant, the state search warrant would have been invalid as "the fruit of the poisonous tree" -- the poisonous tree being the invalid federal search warrant.

The district judge's findings on the validity of the state search warrant are instructive. The trial judge initially concluded that the state search warrants for all of the defendant's residences were not the "fruit of the poisonous tree" because the federal indicia search warrants were valid. (Designated Record at 40). He then alternatively found that even if the federal search warrants were invalid, the state search warrants, including the one issued for Fitzgerald's residence, were still valid because they were based upon the observation of "suspected controlled substances" during the course of sweep searches incident to the execution of the arrest warrants. (Des. Rec. at 40 n.2). Officer Tomschecks' suppression hearing

testimony supports this finding as it applies to Fitzgerald's case. (SH 65-68). Moreover, it is certainly reasonable to infer that Tomscheck could have observed the suspected cocaine residue on the top of the bedstand while he was conducting a legitimate sweep search of Fitzgerald's bedroom.

Thus, because the state search warrant for Fitzgerald's residence was valid, being based upon Tomschecks' plain view observation during the legitimate sweep search, the three guns found in Fitzgerald's apartment would be admissible under the inevitable discovery exception to the exclusionary rule. My conclusion here is of course based upon the assumption that the officers would have discovered all three guns while they were searching for controlled substances under the valid state search warrant. I would therefore affirm Fitzgerald's conviction without applying the plain view-severance approach to the partially invalid

indicia warrants.

ARNOLD, Circuit Judge, concurring, with whom ROSS, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges, join.

For the reasons so ably stated by the Court, I agree that the plain view-severance approach is proper, that the shotgun was validly seized, and that the conviction should be affirmed. I do not join Part III. of the lead opinion, however, because in my view the pistol and the rifle were also validly discovered and seized. A belt buckle could have been found in an overcoat pocket, or behind a dresser drawer. It was therefore wholly proper for the officers executing the warrant to be looking in those places.

I also wish to emphasize that the Court en banc is not holding that the Hell's Angels have a First Amendment right of association, or that any clause in this warrant was not particular enough in its description of the articles to be seized. Those conclusions were reached by the

panel, but they were not referred to the Court en banc for its review. The right-of-association question especially gives me pause. Presumably no one would argue that there is a First Amendment right to ride a motorcycle. Whether the First Amendment nonetheless guarantees the right of two or more people to ride motorcycles in groups, is a question much more doubtful than the panel opinion implies. No one contends that the Hell's Angels petition Congress for redress of grievances, or advocate ideas or doctrines, so far as I know. Whatever right of association they have, then, probably is an aspect of that "liberty" which the Due Process Clause seems to protect against arbitrary or irrational government action, rather than a right entitled to the more expansive protection of the First Amendment, which forbids reasonable as well as unreasonable attempts by Congress to abridge the freedom of speech.

"It may be . . . that association for ends specifically mentioned in the First Amendment will prevail against all state interests not regarded as 'compelling,' while other kinds of association . . . would be protected not by the specific guarantees of the Bill of Rights, but by the more nebulous concept of substantive due process, an oxymoron if there ever was one." United States Jaycees v. McClure, 709 F.2d 1560, 1568 (8th Cir. 1983)(footnote omitted).

The panel opinion holds that the Hell's Angels is an association protected by the First Amendment. Since the Court en banc, as I read its opinion, does not reach that question, but simply takes the panel's conclusion as a given for purposes of analysis, it is not necessary for me to pursue the issue.

HEANEY, Circuit Judge, dissenting, with whom McMILLIAN, Circuit Judge, joins.

I respectfully dissent. The search of

Janice Fitzgerald's home was unreasonable under the circumstances and not supported by probable cause. It in reality was nothing more than a fishing expedition. We should suppress the evidence seized without hesitation.

The interpretative case law today surrounding the fourth amendment tends to obscure the amendment's simple prohibition against unreasonable searches and seizures. This reasonableness standard is not capable of precise definition or mechanical application, but depends upon the circumstances of each case. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977)(per curiam); Chimel v. California, 395 U.S. 752, 765 (1968); Terry v. Ohio, 392 U.S. 1, 19 (1968). In considering the circumstances, we must remember that the right to privacy is "basic to a free society." Camara v. Municipal Court, 387 U.S. 523, 528 (1967). We must examine "the scope of the particular intrusion, the manner in which it is

conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979).

Fourth Amendment protection is strongest at the threshold of the private home. As the Supreme Court recently reaffirmed:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home--a zone that finds its roots in clear and specific constitutional terms: "the right of people to be secure in their * * * houses * * * shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." Silverman v. United States, 365 U.S. 505,511.

Payton v. New York, 445 U.S. 573, 589-590 (1980).

Undeniably, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1977), quoted in Payton v.

New York, supra, 445 U.S. at 585; Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971).

The totality of the circumstances here compels the decision that the search of Fitzgerald's home was unreasonable. First, the circumstances leading up to the search indicate the indicia warrant was a pretext for a general search. The affidavit for the search warrant did not contain any information indicating that drugs or weapons would be found in Fitzgerald's home. Yet, the morning of the search, teams of law enforcement officers from the United States Attorney's Office, the United States Bureau of Alcohol, Tobacco and Firearms, the United States Drug Enforcement Agency, the Nebraska State Patrol, the Douglas County Sheriff's Office and the Omaha Police Department met at the Omaha Police Department. There, various local and federal officers addressed them concerning the execution of the search and arrest warrants.

Those present at the briefing were told they could look everywhere in the suspects' residences and to be on the lookout for guns and drugs. In the event an officer observed these items, a magistrate, typist and other law enforcement personnel were standing by ready to quickly issue state search warrants. The only basis for instructing the officers in this manner was the hope that the thorough search authorized by the indicia warrants would turn up guns and drugs which the courts would later rule admissible under the plain view exception.

Second, the law enforcement officers had little need for the indicia evidence they ostensibly sought. Indicia of membership in the Hell's Angels could provide only circumstantial evidence of the association

element of conspiracy.[1] Moreover, the authorities already had some circumstantial evicence of Fitzgerald's association with Hell's Angels members. The affidavit for the search warrant recites that Fitzgerald is the widow of a Hell's Angel member. Law enforcement officers observed her at her husband's traditional Hell's Angels funeral. In fact, Fitzgerald had gone to the police property unit of the

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[1]As the majority panel notes, police can search for "mere evidence" of a crime if there is a nexus between the item to be seized and criminal behavior. United States v. Apker, 705 F.2d 293 (8th Cir. 1983), citing with approval Warden v. Hayden, 387 U.S. 294, 307 (1967). In other words, there must be probable cause to believe the evidence sought will aid in the particular apprehension or conviction. Id. I do not agree that evidence of membership in a legal organization helps prove a particular defendant conspired with others to commit an illegal act. In Fitzgerald's case, the Hell's Angels indicia in her home could only prove what the police already know: that she is the widow of a Hell's Angel. I would strike down the search warrant because the police had no legitimate reason for searching Fitzgerald's home for Hell's Angels indicia.

Omaha Police Department after her husband's death to retrieve his property, including a Hell's Angels ring and belt buckle. The minimal probative value of the indicia evidence, together with the fact that the government already had evidence of Fitzgerald's association with the Hell's Angels, bolsters the conclusion that the indicia warrant provided a pretext for a general search.

Finally, the affidavit for the search warrant recited no facts which would permit either the neutral magistrate who issued the warrant or any reviewing court to determine whether there was probable cause to believe Fitzgerald was involved in an illegal drug conspiracy. The affidavit incorporates the grand jury indictment which names ten defendants. The indictment states that nine of these defendants are members of the Hell's Angels and the "Defendant Janice Fitzgerald was and is an Associate of the Hell's Angels by rea-

son of her marriage to Leslie Fitzgerald, a deceased member of the Hell's Angels, and by reason of her participation in the activities of the Hell's Angels during the period of this conspiracy." According to the indictment, the Hell's Angels organization, including the defendants, is attempting to monopolize methamphetamine distribution in the Omaha, Nebraska, vicinity. All of the acts alleged pertain to the entire organization; the indictment does not specify a single act by Fitzgerald in furtherance of the conspiracy. The only additional information the affidavit for the search warrant adds is the affiant's reasons for believing indicia of membership in the Hell's Angels would be found in the suspects' homes. Since the minutes of the grand jury are secret, the magistrate and this Court must accept on faith the existence of evidence linking Fitzgerald to the drug conspir-

acy.[2] The impossibility of reviewing the probable cause determination, added to the previously cited factors, makes this search unreasonable.

In sum, a review of the facts leads to the inescapable conclusion that the law enforcement officers were seeking an excuse to execute a general search of Fitzgerald's home. A sealed grand jury indictment, an indicia warrant of doubtful necessity and a conscious resort to the plain view exception provided the excuse. While the outcome of Fitzgerald's trial on the conspiracy count is not relevant to the probable cause determination,

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[2] I do not agree with the majority panel opinion that the incorporation of the indictment into the affidavit for a search warrant provided probable cause to believe, for fourth amendment purposes, that Fitzgerald was engaged in criminal activity. While a grand jury indictment, without more, provides probable cause for an arrest warrant, this rule should not be extended to search warrants. See Thompson, C., The Fourth Amendment Function of the Grand Jury, 37 Ohio L. J. 727 (1976).

I cannot help but note that after months of preparation and weeks of trial, the government could not produce enough evidence to go to the jury on the conspiracy charge. The government could only prove firearm possession violations with evidence bootstrapped into the trial through the plain view exception. I do not think the government should be allowed to succeed in this conscious violation of the fourth amendment protection against the general search. I would therefore reverse Janice Fitzgerald's conviction.

A true copy.

ATTEST:

CLERK, U.S COURT OF APPEALS,
EIGHTH CIRCUIT.